IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 84 of 1980

with

SECOND APPEAL No 221 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RABARI SARMAN DEVA

Versus

RAJPUT SHIVUBHA NANABHA THROUGH LEGAL REPRESENTATIVE

Appearance:

1. First Appeal No. 84 of 1980
   MR SURESH M SHAH for Appellant
   MR JR NANAVATI for Respondents No. 1-4
2. Second Appeal No. 221 of 1983
   MR SURESH M SHAH for Appellant
   MR JR NANAVATI for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL

Date of decision: 17/10/2002

COMMON ORAL JUDGEMENT

1. The facts leading to these appeals between the same contesting parties are as follows:

1.1 One Rabari Sarman Deva was the owner of two fields, one measuring 14 bighas and the other measuring 10 bighas situated in village Muktupur, Taluka Mangrol, District Junagadh. He had executed an agreement dated 7th March, 1959 to sell them to one Rajput Shivubha Nanabhai. The price was fixed at Rs.6,000/-. Rs.600 was paid at the time of execution of the agreement and the remaining amount of Rs.5,400/- was payable in instalments in eleven years, as specified in the sale agreement. Possession of the lands was handed over to Shivubha. There was also a stipulation that Shivubha Nanabhai would pay one-third share of the crop to the maternal grandparents of Sarman Deva till they lived. No interest was to be paid on the amounts which were to be paid to Sarman Deva. After the death of the maternal grandparents of Sarman Deva, he was to execute a sale deed in favour of Shivubha.

1.2 However, Sarman Deva sold the same lands to Rabari Aja Ghela, Deva Bogha and Suda Chana for Rs.8,000/- by a registered sale deed dated 19th August, 1963. They, in turn, filed Civil Suit No.150 of 1963 on 2nd December, 1963 against Shivubha Nanabhai for recovery of possession of the suit lands alleging that they were true owners of the lands since they had purchased the same from Sarman Deva by registered sale deed dated 19th August, 1963. They also claimed that Shivubha should attorn to them and should pay one-third share of the crop to them as they had stepped in the shoes of Sarman Deva. They alleged that Shivubha had refused to do so in spite of the notice and, hence, they had filed the suit seeking the relief of possession and, in addition, the payment of Rs.1,175/- towards their one-third crop share. Shivubha resisted the suit and contended that the suit lands were agreed to be sold by Sarman Deva to him for a consideration of Rs.6,000/- under the agreement dated 7th March, 1959. He claimed that he was in possession of the suit lands prior to that date as a tenant on crop share basis and after the agreement of sale, he continued to be in possession of the lands under the said agreement. He contended that he was ready and willing to pay the balance of consideration by annual instalments. He asserted that he was ready and willing to perform his

obligation under the agreement. He also invoked the doctrine of part performance, as provided in Section 53-A of the Transfer of Property Act. He alleged that the sale deed dated 19th August, 1963 in favour of the plaintiffs in the suit was bogus and without any consideration and not binding on him.

2. The learned Trial Judge accepted the defence of Shivubha and held that the sale in favour of the said plaintiffs by Sarman Deva was illegal, bogus and without consideration and, hence, not binding on Shivubha and that the plaintiffs were not bonafide purchasers without notice. He accepted the defence of Shivubha that Sarman Deva had agreed to sell the suit lands to him for Rs.6,000/- on 7th March, 1959, that he had made part payment towards the agreement and that he had been in possession of the lands. He also accepted the defence of Shivubha based on Section 53-A of the Transfer of Property Act. The appeal filed by the plaintiffs in the said suit was dismissed by the learned Assistant Judge. They filed Second Appeal No.413 of 1966 which was dismissed by this court on 4th April, 1972 (Coram: M.U. Shah, J.). The learned Judge upheld the findings of the courts below that Shivubha had, in part performance of the contract, taken possession of the property and had performed and, in any case, was willing to perform his part of the contract and, hence, Section 53-A of the Transfer of Property Act will be invoked in the case. He also confirmed the finding of the courts below that Shivubha was ready to perform his part of the obligation, that he had paid Rs.6,000/- at the first instance and Rs.400/- plus Rs.100/- and had offered the balance amount to the plaintiffs but it was not accepted. He had also given the crop share to Bai Bheni, Sarman's grandmother, as provided in the agreement dated 7th March, 1959 and the conclusion was inescapable that Shivubha was ready to perform his part of the contract. The learned Judge held that Shivubha had performed his part of the contract and was ready to perform the same at all material times. The finding of the courts below that the sale in favour of the plaintiffs in that case by Sarman Deva was illegal, bogus and without consideration was also confirmed.

3. Thereafter, Sarman Deva filed a Civil Suit against the vendees of the sale deed dated 19th August, 1963. A consent decree was passed in that suit and the vendees of the said sale deed, which had been declared to be bogus and without consideration in the litigation between them and Shivubha, admitted the ownership of Sarman Deva. Sarman Deva thereafter filed Special Civil Suit No.35 of 1974 on 3rd April, 1974 in the Court of

Civil Judge (S.D.), Junagadh against Shivubha Nanabhai and the three persons in whose favour he had subsequently executed the sale deed. He alleged that Shivubha had committed breach of the terms and conditions of the agreement dated 7th March, 1959 and that it was no more subsisting. He contended that Shivubha who was impleaded as respondent no.1 had no right for specific performance of the contract as it was no more subsisting and was not enforceable at law. Sarman Deva asserted that he was the owner of the suit lands and, therefore, he was entitled to get possession of the lands from Shivubha. Shivubha who was impleaded as defendant no.1 in the suit resisted the suit by filing a written statement. He referred to the litigation which had been started by defendants no.2 to 4, the vendees of the subsequent sale deed and also to the fact that the sale deed dated 19th August, 1963 had been declared to be illegal and bogus. According to him, the agreement dated 7th March, 1959 was held to be legal and valid and was subsisting. He pleaded that he had paid annual instalments as per the terms and conditions of the agreement and given one-third share to the plaintiff's maternal grandparents. He asserted that he had always been ready and willing to pay the remaining yearly instalments but it was the plaintiff who took the matter to the court for getting back the land by resorting to unfair tactics.

4. The learned Trial Judge framed the necessary issues arising from the pleadings of the parties and after recording the evidence led by the parties held that Shivubha had paid one instalment of Rs.500/- and one-third crop share of the suit lands for the maintenance of the grandparents of the plaintiff regularly, in pursuance of the agreement of sale dated 7th March, 1959 and that Shivubha was prepared to perform his part of the contract as a part of the agreement dated 7th March, 1959. He also held that the said agreement was subsisting and had not become unenforceable on account of the default of Shivubha, as alleged. He held that the plaintiff had filed the suit on the basis of the title. He could not get the possession which was still protected under Section 53-A of the Transfer of Property Act. He, therefore, dismissed the suit by his judgment and decree dated 17th July, 1979. Sarman Deva, the original plaintiff, has, therefore, filed the First Appeal No.84 of 1980 challenging the said judgment and decree dismissing his suit. During the pendency of the appeal, the respondent no.1 Shivubha Nanabhai who was the original defendant no.1 died and his heirs and legal representatives have been brought on record as respondents no.1/1 to 1/4.

5. After Sarman Deva filed the said suit against Shivubha, Shivubha filed Regular Civil Suit No.435 of 1974 on 27th December, 1974 in the Court of Civil Judge (J.D.), Mangrol claiming specific performance of the agreement dated 7th March, 1959. Sarman Deva who was the defendant in the said suit resisted the same by filing written statement. He contended that Shivubha had failed to comply with the conditions of the agreement and, therefore, he was not entitled to specific performance, as prayed for. He contended that Shivubha was neither really ready nor willing to execute the sale deed within the period. He also contended that the suit was barred by limitation. The learned Trial Judge, after recording the evidence led by the parties, came to the conclusion that the plaintiff had not committed breach of the suit agreement. He also held that the plaintiff was in possession of the suit lands by way of part performance. However, he held that the suit was barred by limitation. He, therefore, dismissed the suit by his judgment and decree dated 27th February, 1981.

6. It appears that Shivubha Nanabhai had died during the pendency of the suit and his heirs and legal representatives were brought on record. They filed an appeal in the Court of District Judge, Junagadh (Civil Regular Appeal No.50 of 1981) challenging the said judgment and decree dismissing their suit. The learned District Judge, by his judgment and decree dated 30th April, 1983, allowed the said appeal and set aside the judgment and decree of the Trial Court and decreed the plaintiffs' suit for specific performance. He upheld the finding of the Trial Court that the plaintiff was ready and willing to perform his part of the contract. On the question of limitation, he held that the cause of action arose on a date between 5th October, 1973 and 2nd May, 1974 and, hence, the suit was within the period of limitation.

7. Sarman Deva, the original defendant, has, therefore, filed Second Appeal No.221 of 1983 challenging the said judgment and decree passed by the learned District Judge. At the time of admission, the following questions were formulated as substantial questions of law:

(1) Whether the suit was barred by Article 54 of the Schedule to the Limitation Act, 1963? If yes, does Section 39 of the Contract Act save the suit?

(2) Whether the deceased plaintiff can be said to have been ready and willing to perform his part of the contract, Exh.30, notwithstanding the fact that no payments are shown to have been made towards maintenance of the maternal grandparents as provided by the said contract?

8. It will be seen that both the First and the Second Appeal arise out of the same agreement dated 7th March, 1959 executed by Sarman Deva and the contesting parties are the same. The appeals have, therefore, been heard together and are being disposed of by this common judgment.

9. Shri S.M.Shah, learned counsel for the appellant made common submissions in both the appeals. He referred to the contents of the agreement dated 7th March, 1959 in which it was stated that Sarman Deva had executed a "kutcha" document and he, therefore, contended, relying on the said expression, that it was not a concluded agreement and not final. He submitted that possession was only permissive and no specific performance can be granted of such an agreement. The appellant's suit was based on title and there is no period of limitation for a suit for possession on title unless adverse possession is proved. The appellant was entitled to a decree for possession. He also referred to the deposition of Shivubha in the suit filed by Sarman Deva and contended that in his cross-examination, he had said that he did not remember how long after the agreement he had paid the amount of Rs.100/- and Rs.400/-. Shivubha had also stated that thereafter, he had gone to pay the amount of instalment but it had not been accepted and thereafter, he had not paid the instalment. He had not paid any amount by money order. He, therefore, contended that the finding of the learned Judge in the suit for possession filed by the appellant that Shivubha was ready and willing to perform his part of the contract was erroneous. He lastly submitted that Shivubha had enjoyed possession of the suit lands for all these years on payment of Rs.1,100/- only and in the circumstances, it will not be just and reasonable to grant specific performance of the contract.

10. Shri J.R. Nanavati, learned counsel for the heirs and legal representatives of Shivubha Nanabhai, who are the contesting respondents in both the appeals, supported the findings recorded by the learned Trial Judge in Special Civil Suit No.35 of 1974 filed by Sarman Deva and the decision of the learned District Judge in

the appeal arising from the decree passed in the Civil Suit by Shivubha that the said suit was within the period of limitation. He submitted that in the suit filed by Shivubha both the courts below have rightly recorded the finding of fact that Shivubha had always been ready and willing to perform his part of the contract.

11. Now, it is not in dispute that Sarman Deva had executed the agreement of sale dated 7th March, 1959 in favour of Shivubha and that Shivubha was put in possession of the lands. There is no substance in the contention, raised for the first time in this appeal, that it is a "kutcha" document and not capable of being enforced. It is clear from the history of the litigation which has been set out earlier that Sarman Deva executed a sale deed in favour of three other persons in 1963 who, in turn, filed a suit on the basis of the sale deed against Shivubha. The said litigation was fought up to the High Court and ultimately the Second Appeal filed by the said persons was dismissed by this court on 4th April, 1972. It was held in the said proceedings that the sale deed executed by Sarman Deva in favour of the said three persons was bogus and without consideration and not binding on Shivubha. It was also held in the said proceedings that Shivubha had always been ready and willing to perform his part of the contract and the doctrine of part performance was attracted. Detailed evidence was recorded in the subsequent suit filed by Shivubha for specific performance in which both the courts below have held that Shivubha had been ready and willing to perform his part of the contract. This finding recorded by both the courts below is a finding of fact based on appreciation of evidence and it cannot be said that they had committed any error of law in arriving at the said finding.

12. As for limitation, the learned District Judge has rightly observed that under the agreement dated 7th March, 1959, the sale deed was to be executed only after the death of the grandparents of Sarman Deva. First, the grandfather died and the grandmother died on 22nd August, 1968. Hence, the suit for specific performance could not have been filed till then. However, at that time, the subsequent sale deed executed by Sarman Deva in favour of three persons was in existence and the suit filed by the said three persons against Shivubha on the basis of the sale deed was still pending. The said litigation ended only on 4th April, 1972 when the Second Appeal was dismissed by this court. Thereafter, Sarman Deva filed the suit against the vendees of the said sale deed and a consent decree was passed on 5th October, 1973 in the

said suit in which the vendees admitted the ownership of Sarman Deva. Till then, Sarman Deva was not in a position to execute the sale deed in favour of Shivubha. Thereafter, Sarman Deva filed the Civil Suit for possession against Shivubha in which the summons were served on 2nd May, 1974. The learned District Judge has, therefore, rightly held that 5th October, 1973 would be the earliest date on which the cause of action for Shivubha's suit for specific performance arose. The suit was, therefore, within time. In my opinion, there is no infirmity in the view taken by the learned District Judge on the question of limitation.

13. There is no doubt that the court has discretion whether to grant specific performance or not but, in the present case, the conduct of Sarman Deva is eloquent and there is no equity in his favour and there is no circumstance which would disentitle Shivubha to a decree for specific performance when it has been consistently held in all the proceedings that he has always been ready and willing to perform his part of the contract. The learned District Judge has, therefore, rightly said that this was a fit case where specific performance should be granted.

14. As a result of the above discussion, the questions of law which have been formulated at the time of admission of the Second Appeal are answered against the appellant. There is also no substance in the First Appeal which has been filed. Both the appeals, therefore, fail and are dismissed with costs.

(M.C. Patel, J.)

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